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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

NORDIC VILLAGE, INC.,
RICHARD A. BAUMGART, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Section 106(c) of the Bankruptcy Code (11 U.S.C.) waives the sovereign immunity of the United States from an action seeking a monetary recovery in bankruptcy.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Robert E. Martin, Lake County Treasurer, was a defendant in the district court and the bankruptcy court. John Howard and the State of Ohio, Department of Taxation, were defendants in the bankruptcy court.*

* In the caption of our petition, we named David O. Simon as the trustee in the bankruptcy case of Nordic Village, Inc. We have since learned that Mr. Simon has been succeeded by Richard A. Baumgart, and we have changed the caption accordingly. See Br. in Opp. ii.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 915 F.2d 1049. The orders of the district court (Pet. App. 37a-45a) and the decision and orders of the bankruptcy court (Pet. App. 46a-52a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 55a-56a) was entered on October 4, 1990. A petition for rehearing was denied on January 23, 1991. Pet.

App. 53a-54a. The petition for a writ of certiorari was filed on April 23, 1991, and granted on June 17, 1991. 111 S. Ct. 2823. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 106, 549, and 550 of the Bankruptcy Code (11 U.S.C.) are set forth in the petition appendix at 57a-60a.

STATEMENT

Respondent Nordic Village, Inc. is the debtor in bankruptcy proceedings pending in the United States Bankruptcy Court for the Northern District of Ohio, No. B84-771. In an adversary proceeding commenced by the trustee, the bankruptcy court entered a judgment for $20,000 against the Internal Revenue Service (IRS). The Sixth Circuit upheld the judgment, concluding that Section 106(c) of the Bankruptcy Code, 11 U.S.C. 106(c), waives the sovereign immunity of the United States from monetary relief.

1. In March 1984, Nordic Village filed a petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101-1174.[1] The IRS learned of the filing in June 1984 and later filed a proof of claim for overdue employment taxes, penalties, and interest totalling approximately $80,000. Meanwhile, in July 1984, Josef Lah, an officer and shareholder of Nordic Village, wrote a check for $26,000 on Nordic Village's corporate account, which he then used to obtain several cashier's checks, including one for $20,000 payable to the IRS. Lah delivered the $20,000 check to the IRS and told IRS to apply it against his personal tax liability. IRS credited Lah's account accordingly. Pet. App. 2a-3a.

[1] The case was later converted to a Chapter 7 proceeding. See Br. in Opp. ii.

2. In December 1984, the trustee appointed in Nordic Village's bankruptcy case commenced an adversary proceeding to recover the $20,000 paid to the IRS.[2] The bankruptcy court held that the payment was an unauthorized transfer that could be avoided under Section 549(a) and recovered under Section 550(a) of the Code. Pet. App. 48a-50a. In so holding, the court rejected the government's argument that, under Section 550(b) of the Code, IRS was protected from recovery as a subsequent transferee that had received the transfer in good faith and without knowledge of its voidability. Pet. App. 49a-50a. The court entered judgment against IRS for $20,000. *Id.* at 51a-52a.

3. The government appealed the bankruptcy court's judgment to the United States District Court for the Northern District of Ohio, renewing its argument that IRS was protected from recovery under Section 550(b) of the Code. The district court affirmed. Pet. App. 37a-44a.

4. On appeal, the Sixth Circuit affirmed the district court's decision. In upholding the money judgment against IRS, the court concluded, over Judge Kennedy's dissent, that Section 106(c) of the Bankruptcy Code authorizes monetary recovery from the federal government. Pet. App. 1a-36a.

a. The majority recognized that in *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989), this Court held that Section 106(c) does

[2] The trustee also sought to recover several other post-petition transfers. According to the trustee's complaint, Lah and his wife had drawn on the debtor's corporate account to pay not only their federal taxes but also their state and local taxes. J.A. 13-16; see also Pet. App. 47a.

not authorize monetary recovery from the States. The court below determined, however, that *Hoffman* did not control for three reasons. First, the court observed, no interpretation of Section 106(c) commanded majority support in *Hoffman*.[3] Second, the court believed that the question in *Hoffman* of Eleventh Amendment immunity entailed a "very different" analysis from the question of federal sovereign immunity in the present case. Pet. App. 4a, 12a. The question here, in the court's view, posed a "simple" issue of statutory construction altogether unlike the plain-statement analysis applicable under the Eleventh Amendment. *Id.* at 12a. Third, the court found that, because the *Hoffman* plurality's analysis of Section 106(c) did not discuss legislative history, the analysis in Justice Marshall's dissent contained "[t]he only clear parsing of the statute." Pet. App. 4a.[4]

[3] In *Hoffman*, Justice White, joined by the Chief Justice and Justices O'Connor and Kennedy, concluded that the language of Section 106(c) "is more indicative of declaratory and injunctive relief than of monetary recovery" (492 U.S. at 102); therefore, the provision did not satisfy the requirement that Congress express an intent to abrogate the Eleventh Amendment immunity of the States in "unmistakably clear" terms (*id.* at 101). Justice Scalia concurred in the judgment, on the ground that Congress lacked power under the Bankruptcy Clause to abrogate the States' Eleventh Amendment immunity. *Id.* at 105. Justice O'Connor joined Justice Scalia's opinion. *Ibid.* Four Justices dissented, finding that Congress did in Section 106(c) "clearly express[] its intent to authorize a bankruptcy court to issue a money judgment against a State." 492 U.S. at 106 (Marshall, J., dissenting, joined by Brennan, Blackmun, and Stevens, JJ.); see also *id.* at 111-114 (Stevens, J., dissenting, joined by Blackmun, J.).

[4] Having decided that it would not follow the plurality in *Hoffman*, the court of appeals likewise refused to follow *Small Business Admin.* v. *Rinehart*, 887 F.2d 165 (1989), in which the Eighth Circuit relied on the *Hoffman* plurality to hold that Section 106(c) does not authorize bankruptcy courts to grant monetary relief against the United States. Pet. App. 7a n.2.

The court of appeals then analyzed Section 106(c) along the lines of the dissenting opinions in *Hoffman*. The court determined that Section 106(c) waived the federal government's sovereign immunity from monetary judgments "in clear and explicit terms." Pet. App. 13a. The court found "nothing in the provision suggesting that it is limited to injunctive or declaratory relief." *Id.* at 6a-7a. The court reviewed the legislative history of Section 106 and concluded that it supported the court's reading of the text. *Id.* at 7a-10a.

The court acknowledged that under its reading Section 106(c) "w[ould] result in different meanings depending upon whether it is being applied to a state or federal governmental unit." Pet. App. 12a-13a. The court justified this disparity as "the inevitable result of applying two different methods of construction." *Id.* at 13a.[5]

b. Judge Kennedy dissented. Pet. App. 17a-36a. "[F]or essentially the same reasons relied upon by the plurality * * * in *Hoffman*," she concluded that, "when reading the language narrowly in favor of the government, as [courts] are required to do, * * * the language of subsection 106(c) only waives sovereign immunity for the purpose of allowing a bankruptcy court to issue declaratory and injunctive relief." Pet.

[5] The court of appeals also held that the trustee was not barred from recovery by Section 550(b) of the Code, because IRS should have known that the $20,000 transfer was voidable. Pet. App. 13a-16a. That issue is not before this Court.

App. 22a. Judge Kennedy also expressed doubt about relying on legislative history as an aid to interpretation in this context. *Id.* at 21a-22a & n.4. She nonetheless reviewed those portions of the legislative history on which the majority had relied, and determined that they did not "produce[] an outcome different from that reached by a plurality of the Supreme Court [in *Hoffman*]." *Id.* at 22a.

ARGUMENT

SECTION 106(c) DOES NOT AUTHORIZE BANKRUPTCY COURTS TO ORDER THE UNITED STATES TO PAY MONEY TO A BANKRUPTCY TRUSTEE

I. THE LANGUAGE OF SECTION 106(c), PROPERLY CONSTRUED, SHOWS THAT CONGRESS DID NOT INTEND TO AUTHORIZE MONETARY RELIEF AGAINST THE UNITED STATES

"It has long been established * * * that the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction.'" *United States* v. *Testan*, 424 U.S. 392, 399 (1976) (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)).[6] The terms of that consent "must

[6] Because "[i]t is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction," *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983), the court of appeals properly considered whether sovereign immunity barred the present action even though that question had not arisen in the bankruptcy court or the district court. See, *e.g.*, *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940); *Minnesota* v. *United States*, 305 U.S. 382, 388-389 (1939); see also *Stevens* v. *Department of the Treasury*, 111 S. Ct. 1562, 1567 (1991) (issue decided by court of appeals was properly before the Supreme Court even if not raised below).

be construed strictly in favor of the sovereign and not enlarge[d] . . . beyond what the language requires." *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983) (citations and internal quotation marks omitted).

Section 106 of the Bankruptcy Code waives the sovereign immunity of "governmental units" under certain defined circumstances.[7] In *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989), a plurality of this Court concluded that the waiver in Section 106(c) did not extend to monetary claims against a State. In contrast, the majority below held that the same provision *did* extend to monetary claims against the United States. The majority sought to explain these "different meanings depending upon whether [Section 106] is being applied to a state or federal governmental unit" on the ground that the

[7] Section 106 provides:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.
>
> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
>
> > (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and
> >
> > (2) a determination by the court of an issue arising under such a provision binds governmental units.

Eleventh Amendment required a clear statement of congressional intent to abrogate *state* sovereign immunity, while abrogation of *federal* sovereign immunity presented "a simple case involving the construction of language enacted by Congress." Pet. App. 12a-13a. In other words, the same statutory language meant different things because different judical canons of construction were applied.

There is no such distinction in approaches to construing Section 106(c). Just as congressional intent to abrogate the immunity of the States must be "unmistakably clear in the language of the statute," *Hoffman*, 492 U.S. at 101, so too an intent to waive the immunity of the United States "cannot be implied but must be unequivocally expressed." *Irwin* v. *Veterans Administration*, 111 S. Ct. 453, 457 (1990). Accord *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Testan*, 424 U.S. at 399; *United States* v. *King*, 395 U.S. 1, 4 (1969).[8]

Quite apart from the fact that the same exacting principles of statutory construction apply to waivers of state and federal immunity, Congress intended in Section 106 to treat the States and the United States the same. That intention is clear from Congress's use of a single term, "governmental unit," to refer to both

[8] Indeed, this Court has concluded that principles of statutory construction may bar certain types of relief against the federal government that are available against the States. Compare *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986) (interest on attorneys' fees cannot be recovered from the United States in Title VII action) with *Missouri* v. *Jenkins*, 491 U.S. 274, 281 n.3 (1989) (interest on attorneys' fees is available in a Title VII action against a State).

sovereigns.[9] See 11 U.S.C. 101(27). There are not separate rules for the States and the United States in the statute, yet that is precisely the result of the court of appeals' interpretation, which "create[s] a distinction that the words of the statute do not contain." *Owen* v. *Owen*, 111 S. Ct. 1833, 1838 (1991).[10] Rather than applying a "different analysis" (see Pet. App. 12a), the court should have followed the same analysis that this Court did in *Hoffman* and determined whether it was "unmistakably clear in the language of [Section 106(c)]" that Congress intended to subject the United States to money judgments. *Hoffman*, 492 U.S. at 101 (quoting *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985)).

In *Hoffman*, a plurality of this Court construed Section 106(c) "as not authorizing monetary recovery from the States." 492 U.S. at 102. The Court was construing the same language that is at issue here. We urge the Court to adopt the analysis of the *Hoffman* plurality and conclude that Section 106(c)

[9] Cf. *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 10 (1989) (finding it "highly significant" that Congress used "virtually identical language" in separate provisions waiving state and federal immunity from actions under CERCLA).

[10] In *Owen*, this Court rejected an interpretation of Section 522(f) of the Code that would have treated State-created exemptions differently from federal exemptions (see 11 U.S.C. 522(b)). Section 522(f) permits a debtor to avoid the fixing of a lien on property if the lien would impair an exemption to which the debtor would have been entitled under Section 522(b) of the Code. The Court concluded that "[n]othing in the text of § 522(f) remotely justifies treating the two categories of exemptions differently." *Owen*, 111 S. Ct. at 1838. Similarly, nothing in the text of Section 106(c) justifies treating the States and the United States differently.

does not authorize monetary recovery from the United States, just as it does not authorize such recovery from the States.

As the plurality in *Hoffman* stated, Section 106(c) contains "limiting language" that is "more indicative of declaratory and injunctive relief than of monetary recovery." 492 U.S. at 102. The first subpart of Section 106(c) is broad. Section 106(c)(1) states that provisions of the Code that contain any of three trigger words—"creditor," "entity," or "governmental unit"—apply to governmental units. 11 U.S.C. 106(c)(1). The second subpart, joined to the first by the word "and," "operates as a further limitation on the applicability of § 106(c)." *Hoffman*, 492 U.S. at 102. Section 106(c)(2) provides that a "determination" by a bankruptcy court of an "issue" arising under one of the pertinent provisions "binds governmental units." 11 U.S.C. 106(c)(2). By limiting courts to making "determination[s]" of "issue[s]," Section 106(c)(2) "narrow[s] the type of relief" available against governmental units to preclude monetary relief. *Hoffman*, 492 U.S. at 102.[11]

The narrow language in Section 106(c) contrasts sharply with the broader language of Sections 106(a) and 106(b). See *Hoffman*, 492 U.S. at 102. While Section 106(c) authorizes a bankruptcy court

[11] Justice Marshall observed in his dissent in *Hoffman* that not all Code provisions containing a trigger word authorize monetary or affirmative injunctive relief, so that Section 106(c)(2) does not serve a limiting function with respect to some of the provisions triggered under Section 106(c)(1). 492 U.S. at 108-109. As Judge Kennedy noted below, however, "[i]t is not illogical for Congress to provide for such a limitation in subsection 106(c)(2) rather than in each individual section that contains a provision allowing for monetary recovery." Pet. App. 24a.

to make a "determination * * * of an issue," Sections 106(a) and 106(b) grant it authority with respect to a "claim" against a governmental unit. A "claim" is defined by the Code to include a "right to payment," 11 U.S.C. 101(4)(A). By using the term "claim" in Sections 106(a) and 106(b), Congress clearly contemplated that monetary relief would be available. Cf. *Johnson* v. *Home State Bank*, 111 S. Ct. 2150, 2154-2155 (1991) (Congress intended "claim" to have broad meaning). Congress's use of different, narrower language in Section 106(c) just as clearly indicates an intention to preclude such relief under that provision. See *Immigration & Naturalization Serv.* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).[12]

The court of appeals found "nothing in [Section 106] suggesting that it is limited to injunctive or declaratory relief." Pet. App. 6a-7a. That is because the court ignored the limitations set forth in Section 106(c)(2). Under the court of appeals' approach—like that of the petitioner in *Hoffman*—Section 106(c) "would have exactly the same effect if subsection (c)(2) had been totally omitted." *Hoffman*, 492 U.S. at 103. The plurality in *Hoffman* properly rejected such an approach, observing that it contravenes

[12] Justice Stevens acknowledged in his dissent in *Hoffman* that construing Section 106(c) to authorize monetary relief causes the scope of that provision to overlap with the scope of Sections 106(a) and 106(b). 492 U.S. at 113. He cited the opening phrase of Section 106(c)—"[e]xcept as provided in subsections (a) and (b)"—as evidence that Congress acknowledged the redundancy. *Ibid.* In our view, however, the opening phrase expresses Congress's intent not to authorize monetary relief under Section 106 "[e]xcept as provided in subsections (a) and (b)." That reading is more consistent with the structure of Section 106 as a whole.

the duty of courts "to give effect, if possible, to every word and clause of a statute." *Ibid.* (quoting *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955), and *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1883)).[13]

The structure of Section 106 also shows that Congress did not intend to authorize monetary relief under Section 106(c). In the three subsections of Section 106, there is a relationship between the scope of the waiver and the nature of the relief against the sovereign that is authorized: the broader the relief authorized, the narrower the scope of the waiver. Section 106(a) authorizes the broadest relief—affirmative monetary recovery—and it is the narrowest in scope. Section 106(a) is not applicable here; it applies only when the government has filed a proof of claim against the estate and the estate has a compulsory counterclaim against the government.[14] See S.

[13] In his dissent in *Hoffman*, Justice Marshall argued that Section 106(c)(2) should be understood as the third of three steps that Congress took in Section 106(c) to "ensur[e] that the abrogation of [Eleventh Amendment] sovereign immunity was express," 492 U.S. at 107, the first two steps being inclusion of the phrase "notwithstanding any assertion of sovereign immunity" and of subpart (c)(1). In our view, subpart (c)(2) cannot be treated as merely a restatement of subpart (c)(1), but rather must be given independent effect. As the differing language of the two subparts indicates, subpart (c)(1) describes the subject matter of disputes that courts may entertain under Section 106(c), and subpart (c)(2) describes the relief that courts may grant in such disputes.

[14] Although the government filed a proof of claim against the estate, the relief sought here would not be authorized under Section 106(a), as the trustee conceded below. Respondent's C.A. Br. 12. Section 106(a) does not apply because the trustee's claim against the IRS did not "ar[i]se out of the same transaction or occurrence" (11 U.S.C. 106(a)) as the

Rep. No. 989, 95th Cong., 2d Sess. 29 (1978); cf. Fed. R. Civ. P. 13(a). Section 106(b) is broader in scope than Section 106(a), but is more restrictive in terms of relief. Section 106(b) is also not applicable here; like Section 106(a), it applies only when the government has filed a proof of claim.[15] Unlike Section 106(a), however, Section 106(b) allows the estate to assert any claim, not just compulsory counterclaims, against the government. But Section 106(b) does not authorize affirmative monetary recovery; it limits relief to an offset of an estate's claim against the claim of a governmental unit. *Hoffman*, 492 U.S. at 102.

Section 106(c) is broadest in scope, since its applicability does not depend on the government's filing a claim against the estate; instead, Section 106(c) applies when an issue arises under any of the "over 100 Code provisions" (*Hoffman*, 492 U.S. at 102) that contain the words "creditor," "entity," or "governmental unit." Given the comparative breadth of Section 106(c) in this respect, the structure of Section 106 strongly suggests that the relief available under Section 106(c) should be correspondingly narrow.

IRS's claim against the estate. The IRS's claim was based on employment taxes assessed against Nordic Village before it petitioned for bankruptcy. The trustee's claim was based on a defalcation by an officer of Nordic Village after the petition was filed.

[15] Section 106(b) does not apply because the trustee did not seek an offset. See 11 U.S.C. 106(b). As respondent emphasized below, "the Trustee has brought an action to recover money from the United States." Respondent's C.A. Br. 13. The order entered by the bankruptcy court thus "is not limited to the value of the IRS's claim against the estate." Pet. App. 20a (Kennedy, J., dissenting). Cf. *United States* v. *McPeck*, 910 F.2d 509 (8th Cir. 1990).

Indeed, the court of appeals' broad interpretation of Section 106(c) would render Sections 106(a) and 106(b) largely superfluous. The court of appeals' reading of Section 106(c) authorizes money judgments against the government for any claim based on a Code provision containing a trigger word. One such provision is Section 542(b), which authorizes trustees to bring contract actions and actions to recover other forms of indebtedness against any "entity." 11 U.S.C. 542(b). Such claims make up a significant portion of claims that a trustee would have against the sovereign. Under the court of appeals' approach, none of these claims would be subject to the carefully crafted limitations on recovery in Sections 106(a) and 106(b). Sections 106(a) and 106(b) establish a rule that limits the availability of monetary relief to cases in which the government has filed a proof of claim. The court of appeals' reading of Section 106(c) would swallow up that rule, allowing, for example, monetary relief on contract claims whether or not the governmental unit filed a proof of claim.

On the other hand, as the plurality recognized in *Hoffman*, construing Section 106(c) to authorize declaratory or injunctive-style relief does not deny all effect to that provision. So construed, Section 106(c) "waives the sovereign immunity of the Federal Government so that the Federal Government is bound by determinations of issues by the bankruptcy courts even when it did not appear and subject itself to the jurisdiction of such courts." *Hoffman*, 492 U.S. at 103.[16] Thus, under Section 106(c), the United States

[16] See also *Nevear* v. *Schweiker*, 674 F.2d 1201, 1203-1204 (7th Cir. 1982) (holding that under Section 106(c) a bankruptcy court could discharge a debt owed to the Social Security Administration), cited with approval in *Hoffman*, 492 U.S. at 102, 103.

"would be bound, like other creditors, by discharge of debts in bankruptcy, including unpaid taxes." *Id.* at 102.[17] The discharge of debts owed to the federal government is often essential, for example, to businesses seeking to reorganize under Chapter 11. See 11 U.S.C. 1141(a) (terms of confirmed reorganization plan bind any "creditor," one of trigger words in Section 106(c)). The *Hoffman* plurality's interpretation of Section 106(c) therefore is faithful to the Bankruptcy Code's general policy of affording debtors a "fresh start." See *Grogan* v. *Garner*, 111 S. Ct. 654, 659 (1991).[18]

[17] 11 U.S.C. 505(a) provides that a court "may determine the amount or legality of any tax." Because Section 505(a) contains a trigger word ("governmental unit"), a determination under that provision is binding on governmental units pursuant to Section 106(c).

[18] The plurality's interpretation also accords with the traditional understanding of sovereign immunity evinced in this Court's decisions and by Congress. Under the plurality's interpretation, States are subject to monetary recovery only when they consent to such recovery by filing a proof of claim. This restriction reflects the fact that freedom from monetary relief is at the heart of Eleventh Amendment immunity. See *Edelman* v. *Jordan*, 415 U.S. 651, 666-668 (1974). Cf. *Ex parte Young*, 209 U.S. 123 (1908). Similarly, Congress has been especially careful in waiving the federal government's sovereign immunity from monetary relief. See *Library of Congress* v. *Shaw*, 478 U.S. 310, 315-316 (1986) (federal government was not required to pay interest on attorneys' fees in Title VII case because Congress had not made liability for interest "affirmatively and separately" explicit); *Lehman* v. *Nakshian*, 453 U.S. 156, 161 & n.8 (1981) (Congress's reluctance to provide for jury trials when waiving sovereign immunity reflects concern that juries will return excessive money judgments).

The *Hoffman* plurality suggested that Section 106 (c) also authorizes certain forms of injunctive relief. See 492 U.S. at 102. That does not mean, however, that a trustee can ask for an injunction ordering the government to pay money. The trustee in *Hoffman* was barred from obtaining either an order requiring the "turnover" of funds (see 11 U.S.C. 542(a)) or an order requiring the return of an avoided transfer (see 11 U.S.C. 550(a)). 492 U.S. at 99, 102. In concluding that such relief was barred, the plurality made clear that Section 106(c) does not authorize *any* form of "monetary recovery" (492 U.S. at 102). The plurality's conclusion fully applies here, where the trustee, like the trustee in *Hoffman*, sought to recover an avoided transfer.[19]

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[19] In our view, Section 106(c) permits injunctive relief of the sort this Court upheld in *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983). In *Whiting Pools*, the IRS seized a company's tangible property—"equipment, vehicles, inventory, and office supplies" (*id.* at 200)—to satisfy the company's tax liabilities. As the Court's opinion emphasized, the business retained ownership of the property even after it came into the hands of the IRS. *Id.* at 200, 211. Under these circumstances, the Court held, a bankruptcy court could order the IRS to turn over the property pursuant to Section 542(a) of the Code. The order in *Whiting Pools* thus amounted to a binding determination that the IRS "[was] require[d] * * * to seek protection of its interest according to the congressionally established bankruptcy procedures, rather than by withholding the seized property from the debtor's efforts to reorganize." 462 U.S. at 212.

II. LEGISLATIVE HISTORY IS IRRELEVANT IN INTERPRETING SECTION 106(c) AND, IN ANY EVENT, CONFIRMS THAT CONGRESS DID NOT INTEND TO AUTHORIZE MONETARY RELIEF AGAINST THE UNITED STATES

The plurality in *Hoffman* declined to examine legislative history in deciding whether Section 106(c) abrogated the States' Eleventh Amendment immunity from monetary recovery. It observed that "[l]egislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment" because, under *Atascadero*, Congress must make such an intention unmistakably clear on the face of the statute. *Hoffman*, 492 U.S. at 104 (quoting *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989)). Thus, the plurality reasoned, "[i]f congressional intent is unmistakably clear in the language of the statute, reliance on committee reports and floor statements will be unnecessary, and if it is not, *Atascadero* will not be satisfied." 492 U.S. at 104.

Legislative history is likewise irrelevant in determining whether Section 106(c) waives federal sovereign immunity from monetary recovery. In the federal context as in the state, abrogation of immunity "cannot be implied but must be unequivocally expressed." *Irwin* v. *Veterans Administration*, 111 S. Ct. at 457. Resort to legislative history is appropriate only when congressional intent is *not* "unequivocally expressed" in the statute, see, *e.g.*, *Toibb* v. *Radloff*, 111 S. Ct. 2197, 2200 (1991); *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922, 928 (1991); *United States* v. *Rojas-Contreras*, 474 U.S. 231, 235 (1985), so legislative history will never be an appropriate source of a waiver of sovereign immunity.

Congress set forth in Section 106 rules applicable to "governmental units." Because Congress in writing the statute treated the States and the United States the same, courts should likewise accord them identical treatment when construing the statute. That means that the scope of federal sovereign immunity under Section 106 should be determined solely based on its text, just as the *Hoffman* plurality determined the scope of the States' immunity under the same provision solely based on the statutory text. It would be a curious jurisprudence that concluded that the same words in Section 106 meant one thing with respect to the States but another with respect to the United States, not because the legislative history suggested different treatment, but simply because legislative history could be resorted to in the latter case but not the former.

In any event, the legislative history confirms that Congress intended to treat the States and the United States—"governmental units"—the same under Section 106, and nothing in that history supports the view that monetary relief was authorized under Section 106(c). The States and the United States were treated the same in the waiver of sovereign immunity proposed to Congress in 1973 by the Commission on the Bankruptcy Laws of the United States.[20] They

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[20] The Commission's proposal provided:

> *Section 1-104. Applicability of Act to United States, States, and Subdivisions.* All provisions of this Act shall apply to the United States and to every department, agency, and instrumentality thereof, and to every state and every subdivision thereof except where otherwise specifically provided. This section does not render any branch or unit of the government eligible for relief as a petitioner except as provided in Chapter VIII, or subject to relief as a debtor upon an involuntary petition.

Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93d Cong., 1st Sess. Pt. 2, at 10 (1973). The Commission's proposal was included in bills introduced in the 94th Congress. S. 236, 94th Cong., 1st Sess. (1975); H.R. 31, 94th Cong., 1st Sess. (1975).

were also treated the same in every subsequent bill that Congress considered.[21]

Other than treating the States and the United States the same, Section 106 bears no resemblance to the waiver proposed by the Commission. The Commission's proposal placed the state and federal government on the same footing as any other creditor. See note 20, *supra*. It clearly would have authorized the money judgment entered against the IRS in this case. Congress did not, however, enact the broad language of the Commission's proposal. Instead, it enacted the much narrower language in Section 106(c) authorizing "a determination by the court of an issue" arising under certain Code provisions. The language that Congress enacted should not be interpreted to have the same effect as the language that Congress rejected. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *Cardoza-Fonseca*, 480 U.S. at 442-

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[21] H.R. 6, 95th Cong., 1st Sess. § 106 (1977); H.R. 7330, 95th Cong., 1st Sess. § 106 (1977); S. 2266, 95th Cong., 1st Sess. § 106 (1977); H.R. 31, 94th Cong., 1st Sess. § 1-104 (1975); H.R. 32, 94th Cong., 1st Sess. § 1-104 (1975); S. 235, 94th Cong., 1st Sess. § 1-104 (1975); S. 236, 94th Cong., 1st Sess. § 1-104 (1975); H.R. 10792, 93d Cong., 1st Sess. § 1-104 (1973); S. 2565, 93d Cong., 1st Sess. § 1-104 (1973).

443 (quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 392-393 (1980) (Stewart, J., dissenting)).

Notwithstanding this principle, Justice Stevens stated in his dissenting opinion in *Hoffman* that Section 106(c) "restored to a large extent the power of bankruptcy courts" granted in the Commission's proposal. 492 U.S. at 112. With all respect, the circumstances under which Congress enacted Section 106(c) fail to support the dissenters' view. As the dissent observed, Congress rejected the Commission's proposal "apparently because of concerns that Congress did not have the constitutional power to abrogate completely the State's sovereign immunity." *Ibid.* There is no evidence that Congress ever set aside these concerns. These concerns resulted in congressional narrowing of the abrogation of the States' immunity proposed by the Commission and—with the consistent decision to treat the States and the United States the same—a corresponding narrowing of the waiver of federal sovereign immunity.

As reported out of committee, the bills enacted as the Bankruptcy Reform Act of 1978 contained waiver provisions consisting of two subsections similar to Sections 106(a) and 106(b) as enacted. H.R. 8200, 95th Cong., 1st Sess. (1977); S. 2266, 95th Cong., 2d Sess. (1978). The reports accompanying the bills explained that while Congress can waive federal sovereign immunity completely, "Congress does not, however have the power to waive sovereign immunity completely with respect to claims of a bankrupt estate against a State." S. Rep. No. 989, *supra*, at 29; H.R. Rep. No. 595, 95th Cong., 1st Sess (1977). Congress was plainly expressing doubt that it could subject States to money judgments in the absence of a waiver by the State (such as the filing of a proof of claim).

Section 106(c) was added to the bills after they were reported out of committee. The addition occurred during an informal conference that did not result in a formal conference report.[22] Because of time constraints, both the House and Senate subsequently passed the bill with little debate.[23] In light of the concerns earlier expressed in the committee reports, it seems unlikely that Congress intended by its belated addition of Section 106(c) to restore the broad waiver previously rejected.

Moreover, congressional statements made when Section 106(c) was proposed confirm that Congress did not intend the provision to authorize monetary relief. In statements made on the floor in lieu of a conference report, the sponsors of the bankruptcy legislation explained that "Section 106(c) codifies in re Gwilliam, 519 F.2d 407 (9th Cir. 1975) and in re Dolard, 519 F.2d 282 (9th Cir. 1975), permitting the bankruptcy court to determine the amount and dischargeability of tax liabilities owing by the debtor or the estate prior to or during a bankruptcy case whether or not the governmental unit to which such

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[22] 124 Cong. Rec. 32,392, 32,394 (1978) (statements of Rep. Edwards).

[23] Because the bill in which Section 106(c) first appeared did not go to a formal conference, it was considered on the floor of the House and passed under a unanimous consent procedure. See 124 Cong. Rec. 32,391, 32,420 (1978). The Senate subsequently considered the bill under an abbreviated time agreement. *Id.* at 33,989 (remarks of Sen. Byrd). The Senate passed the bill with a series of unprinted amendments, not relevant here, to which the House agreed, again pursuant to the unanimous consent procedure. *Id.* at 33,990-33,991, 34,019, 34,145. See generally Klee, *Legislative History of the New Bankruptcy Law*, 28 DePaul L. Rev. 942, 954-956 (1979).

taxes are owed files a proof of claim." 124 Cong. Rec. 32,394 (1978) (statement of Rep. Edwards); *id.* at 33,993 (statement of Sen. DeConcini).[24] Determining the amount and dischargeability of tax liabilities does not involve monetary recovery from the United States.

The sponsors went on to explain that "subsection (c) is not limited to those issues, but permits the bankruptcy courts to bind governmental units on other matters as well." 124 Cong. Rec. 32,394 (1978) (statement of Rep. Edwards); *id.* at 33,993 (statement of Sen. DeConcini). The "other matters" to which the sponsors referred, in our view, meant issues that arose under Code provisions containing one of the trigger words in Section 106(c)(1). Thus, Section 106(c) authorized the bankruptcy courts to determine the amount and dischargeability of a wide variety of debts and obligations to the United States. Again, that does not involve monetary recovery from the United States.

Justice Stevens understood the "other matters" referred to in the floor statements to include claims for monetary relief. *Hoffman*, 492 U.S. at 113. He

[24] In *In re Gwilliam*, 519 F.2d 407 (1975), the Ninth Circuit held that "the Bankruptcy Court had jurisdiction under § 11(a)(2A) [of the old Bankruptcy Act] to determine the amount and legality of the federal taxes due and owing by the Bankrupt * * * and to determine the Bankrupt's liability and provable indebtedness therefor, under [the discharge provisions of Title 11], notwithstanding the lack or absence of a prior claim * * * by IRS." 519 F.2d at 410. Section 2(a)(2A) of the former Act provided that bankruptcy courts could determine "any question arising as to the amount or legality of any unpaid tax." 11 U.S.C. 11(a)(2A) (1976). *Dolard* extended the holding of *Gwilliam* to taxes accruing during administration of the bankruptcy estate. *In re Dolard*, 519 F.2d 282, 286 (9th Cir. 1975).

observed that, in concluding their explanation of Section 106(c), the sponsors stated that "section 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit." 492 U.S. at 112-113 (quoting 124 Cong. Rec. 32,394 (1978) (statement of Rep. Edwards); *id.* at 33,993 (statement of Sen. DeConcini)). The sponsors later stated that, under section 106(c), "the Government is subject to avoidance of preferential transfers." *Hoffman*, 492 U.S. at 113 (quoting 124 Cong. Rec. 32,400 (1978) (statement of Rep. Edwards); *id.* at 34,000 (statement of Sen. Deconcini)). Justice Stevens found "no suggestion" that the authority to avoid preferential transfers "did not include the power to order return of real property and the payment of money damages or that the issues that the bankruptcy court could determine under § 106(c) were limited to whether prospective or declaratory relief was appropriate." *Hoffman*, 492 U.S. at 113.

The Bankruptcy Code itself, in our view, defeats the suggestion that *avoidance* of a transfer is the same as *recovery* of the transfer. A major reform effected by the Code was to "enunciate[] the separation between the concepts of avoiding a transfer and recovering from the transferee." H.R. Rep. No. 595, *supra*, at 375; S. Rep. No. 989, *supra*, at 90. In distinguishing between avoiding a transfer and recovering it, Congress recognized that the two concepts are logically distinct. See 4 *Collier on Bankruptcy* ¶ 550.01, at 550-2 to 550-3 (L. King 15th ed. 1991) ("The particular theory under which a transfer has been avoided is, for all intents and purposes, irrelevant to the liability of the transferee against whom the trustee claims recovery of the property.").

Cf. *Federal Housing Admin.* v. *Burr*, 309 U.S. 242, 250-251 (1940). Accordingly, Congress prescribed the circumstances under which transfers could be avoided and those under which avoided transfers could be recovered in separate sections of the Code. The avoidance provisions are Sections 544 through 549; the recovery provision is Section 550. 11 U.S.C. 544-550; see also 11 U.S.C. 522(f) (authorizing debtor to avoid certain liens that would impair debtor's ability to exempt property from the estate under 11 U.S.C. 522(b)).

Because Congress treated avoidance and recovery as distinct concepts, we do not believe that the references to the trustee's "avoiding powers" (124 Cong. Rec. 32,394 (1978) (statement of Rep. Edwards); *id.* at 33,993 (statement of Sen. DeConcini)) express an intent to authorize monetary *recovery* under Section 106(c). Instead, by these references the legislators meant what they said: that a court can determine whether a transfer to a governmental unit may be *avoided*. Thus, the bankruptcy court in this case had the power to declare that the $20,000 transfer to IRS was voidable as an unauthorized post-petition transfer. See 11 U.S.C. 549. The court did not, however, have authority to grant a recovery in that amount from the federal government.

A bankruptcy court's authority to avoid a transfer to a governmental unit can provide a meaningful remedy in the absence of recovery from the government. In this case, for example, the trustee could have sought recovery from Josef Lah. If the trustee had done so, a prerequisite for recovery would be a determination that the transfer to the IRS was voidable. Section 106(c) empowers the court to make such determinations. It does not empower a court to order recovery of money from the United States.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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